Pacific West Health Medical Center Inc. Employees Retirement Trust et al ...ld Greenwich Group et al Doc. 106 Att. 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

Affidavit of Mark A C Diel

Tab 9

2 of 3

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of private placement, to be followed immediately by a public issue to raise an additional $2 million, and then Aequitas would seek listing and official quotation, hoped for later in 1986.

161 An open letter from Mr Gledhill on behalf of AEFC dated 10 March 1986 was included in the memorandum. It said:

> 'Australian European Finance Corporation Limited supports the formation of Aequitas Limited by Mr Geoffrey Mullins, Managing Director of AEFC Advisory Services Pty Ltd and Mr Graham Rees a consultant to that company.
>
> 'In endorsing Aequitas' objectives Australian European Finance Corporation confirms that it will be working closely with the company by referring to it suitable investment propositions and joining with it in mutually beneficial business ventures.
>
> Over the next few years Australian European Finance Corporation is planning to expand its involvement in equity investment and Aequitas is seen as a valuable adjunct to the operations of both Australian European Finance Corporation and AEFC Advisory Services.'

162 Mr Gledhill's letter does not disclose the substantial role of AEFC itself in the formation of Aequitas, nor the detailed strategy developed in his paper dated 2 September 1985. Nor does the letter explain what would constitute suitable criteria for the referral of investments to Aequitas, or how Aequitas would be a 'valuable adjunct' to AEFC and AEFCAS.

163 The private placement memorandum contained a section entitled 'Corporate Objectives', saying that the principal objective was to provide long-term development capital to growing commercial concerns with good prospects and defined future plans. A 'Management Overview' outlined some proposals for the management of Aequitas by a 'small-overhead investment service organisation'. Then the memorandum described the 'Initial Investments' which had been made by Aequitas No 1. Of Rendell Industries it said only this:

> 'Aequitas No 1 has a commitment to complete the purchase from AEFC Leasing Pty Ltd of 74.8% of Rendell. Rendell is a group involved in ceiling subcontracting and general building services, with advanced plans to move into merchandising and other related fields. Rendell has a budgeted turnover in excess of $20 million for the 1985/86 financial year with an estimated pre-tax profit of $750,000 (tax losses will shelter this income). Rendell has been in business for approximately 58 years, has 300 employees and dominates its business segment. AEFC Advisory Services Pty Ltd currently is overseeing and managing a programme which will list Rendell on the Second Board, Melbourne and Sydney, by mid May, 1986. An Underwriting Agreement between Rendell and Bache Cortis & Carr Ltd has been entered into agreeing to underwrite a rights issue, upon Rendell's listing. This and other issues will dilute the position of Aequitas No 1 to approximately 30% of the issued ordinary shares. Aequitas No 1 is purchasing the shares in Rendell for $960,000, satisfied by debt repayable on or before 1st April, 1986.'

164 The report by Arthur Young, attached to the memorandum, did not purport to consolidate the Rendell group or give information about it. However, it recorded that Aequitas had resolved to revalue its investment in Aequitas No 1 by $72,000 and to issue partly paid shares to companies associated with Mr Rees and Mr Mullins. The memorandum showed that over 7.2 million shares of 25 cents each, most of them paid out to only one cent each but ranking equally for bonuses and rights, had been issued to interests associated with Mr Mullins and Mr Rees. An additional 5 million shares were now offered, the minimum overall level of subscriptions being set at 4 million shares.

165 The memorandum listed the directors as Mervyn Rich (Chairman), Geoffrey Mullins (Deputy Chairman), Graham Rees (Managing Director), and Alan Pond and Robert Donohoe, and gave biographical information about each of them. Mr Rees resigned as a director of Rendell Industries on 2 April 1985.

166 There is no hint in the memorandum of the liquidity problems that had plagued Rendell over the previous months, or the downsizing of staff, and the estimated pre-tax profit is presented without qualification. No information is given about AEFC's loans to Rendell. Nor is there any mention of the

fact that AEFC Leasing had acquired the shares in Rendell Industries less than two months before selling them to Aequitas No 1, for a consideration of only $250,000 (plus the alleged but illusory consideration of procuring loan funds from AEFC). Finally, the memorandum does not mention the $50,000 fee received by AEFCAS out of the sale.

Fundraising under the private placement memorandum

167 The memorandum was distributed to various prospective investors in March 1986. For example, on 24 March 1986 Mr Mullins on behalf of Aequitas wrote to the Commonwealth Bank of Australia enclosing copies of the memorandum and inviting the Bank to take up shares. The letter asserted that Aequitas was 'independently managed' and that its objectives had been set to achieve its own goals, not to meet objectives set by the network of relationships which it had. I regard those assertions as self-serving and far from conclusive.

168 Mr Gledhill submitted a memorandum dated 19 March 1986 to the Australian Committee of AEFC for consideration at its May 1986 meeting. The memorandum recommended that AEFC should take up 400,000 fully paid ordinary 25 cent shares in Aequitas for $100,000, with an option to subscribe for an additional 1.6 million shares exerciseable by 31 May 1986 for an additional $400,000. He drew attention to the utility of Aequitas for AEFC, in much the same words as he had used in his strategy paper of 2 September 1985. He said that it would assist the stockbrokers in the flotation of Aequitas if AEFC were to take a direct investment in the company.

169 He said that Aequitas was 'conceived and structured' by Mr Mullins. That observation does not give enough credit to Mr Gledhill himself, for if he did not conceive the Aequitas idea, he was involved in its development from a very early time.

170 Rather than waiting for the May meeting of the Australian Committee, Mr Gledhill circulated his memorandum to the members of the Australian Committee immediately in March, inviting them to give their decision on a 'round-robin' basis. The Chairman of the Committee, Mr Christie, made it clear that he did not favour AEFC investing in Aequitas, because the investment could be interpreted by the investing public as an endorsement of Aequitas by the Commonwealth Bank. In a memorandum dated 26 March 1986 Mr Gledhill remarked that Mr Christie 'obviously still holds reservations as to how successful this company might be and does not want to provide any suggestion that the CBA will be used as a source of feedstock to supply Aequitas with investment opportunities'. In view of Mr Christie's attitude, the proposed investment was deferred for discussion by the Committee at their meeting in May.

171 Notwithstanding the absence of support by AEFC, Bache was able to place $2.35 million of the initial private placement by late March 1986, including an investment of $750,000 by AMP which would be settled on 1 April, in time for completion of the Rendell purchase. Sufficient money must have come in by 1 April, because on that day Aequitas forwarded to Mr Gledhill a cheque for $960,000 in full settlement of moneys owing under the agreement of 25 November 1985. This was in fact an overpayment of $1,000, since that amount had been paid on 25 November 1985. The $1,000 was duly refunded on 3 April.

172 The Australian Committee of AEFC met on 30 April 1986, and agreed unanimously that AEFC should not take up the investment of $500,000 in Aequitas that had been recommended by management. The Committee's reasoning was that an investment by AEFC referred to in Aequitas' prospectus might incorrectly imply that AEFC's shareholder banks were committed to support Aequitas. The Committee instructed management to ensure that the public prospectus and media launch of Aequitas made it clear that AEFC and its shareholders had no financial interest in Aequitas.

173 Of course, by that time Aequitas had issued a private placement memorandum and had attracted significant investments. But the proposed prospectus for a public offer of shares was still in course of preparation. Mr Gledhill sent a memorandum to Mr Mullins on 2 May 1986 reporting the Australian Committee's decision and indicating that the Committee had criticised AEFC's letter of 10 March 1986 which had been included in the private placement memorandum, principally because the AEFC

letterhead identified its shareholder banks. He proposed a redrafting of the letter, on a different letterhead, for the public prospectus, in which the letter would point out that AEFC did not hold any financial interest in Aequitas.

Mr Gledhill's report of April 1986 and the formation of AEFC Equities

174 Mr Gledhill prepared a further board paper dated 16 April 1986. He said that management's experience and investigations since the earlier paper had only served to confirm the desirability of gradually building up an involvement in equity investment. The objectives would be to 'broaden the range of AEFC's financial services, gain increased recognition as an innovative financier and provide an attractive return on the funds invested'. Mr Gledhill proposed that a special purpose funding vehicle to be known as AEFC Equities Ltd would be used to make equity investments. AEFC Equities Ltd would be a new unlisted public company rather than the existing entity, AEFC Leasing. It would be wholly owned by AEFC and therefore individual transactions would need to be approved or ratified by the Foreign Investments Review Board, as AEFC had not been able to obtain a blanket approval for its investments. AEFC Equities would be funded predominantly by loan moneys from AEFC. Its investments would be realised by sale to other investors, facilitated in many cases by the intention to float the relevant company on the Stock Exchange.

175 Mr Gledhill's paper also reported on the formation and flotation of Aequitas. He said that an initial capital raising of $7 million had been arranged by a leading Melbourne stockbroker by way of a $5 million private placement, which had been filled in less than three weeks, with the balance to come from a public float, probably in August 1986. He said that Aequitas would be managed by the directors of AEFCAS and would play an important role in the activities of AEFC Equities and the merchant bank, as follows:

> 'Any investment proposition considered unsuitable for AEFC Equities could be referred to Aequitas, whose wider investment criteria might permit acceptance.
> AEFC Equities will be able to offer Aequitas options over its investments where it desires to realise a short term profit and fulfil its policy of being a short term investor.
> Aequitas is capable of removing much of the primary risk of equity investment positions from AEFC.
> Aequitas is an Australian owned company, not subject to FIRB guidelines. Accordingly, once it accepted an option to acquire shares held by AEFC Equities any case for investment presented by AEFC Equities to the FIRB could be greatly strengthened.
> Aequitas will augment the activities of the Advisory Service by providing an alternative source of equity funds, thereby assist the advisory clients.
> Aequitas will be able to secure additional clients for AEFC through its interaction with the Advisory Service.'

176 These observations give a clear insight into Mr Gledhill's thinking. He saw the formation of Aequitas as an integral part of a strategy (the other principal part being that AEFC's investments must be short term and therefore capable of being disposed of quickly) for laying off the risk to AEFC of moving into the field of equity investment. Implied in this strategy is the proposition that Aequitas would operate in AEFC's interests.

177 Mr Gledhill reported that, since the October board meeting, 14 proposals had been considered but only four had received serious consideration, including the Rendell Industries investment. He reported briefly on the Rendell Industries investment, noting the 'substantial capital gain' to AEFC Leasing and observing that the company had been given 'a fresh sense of direction through the introduction of new management'.

178 The April paper was considered by the AEFC board at its meeting on 23 May 1986. The board resolved to permit management to proceed with a gradual and selective expansion of equity investments on the basis outlined in the paper. The minutes noted that there was discussion of the 'potential conflict of interest within the AEFC Group arising from the establishment of Aequitas Ltd and the possible moral obligations flowing from AEFC's association and identification with that company', but no

particulars of that discussion were given. The board resolved to seek further details of the need to establish AEFC Equities as a separate subsidiary, and it delegated authority to approve the incorporation of AEFC Equities, in light of additional information, to its Australian Committee.

179 In fact, management had put the formalities in train before the board's decision, with the result that AEFC Equities was incorporated on 3 June 1986. Mr Gledhill wrote a further paper about AEFC Equities, dated 15 July 1986, for the Australian Committee. Although the paper did not contain much in the way of new information, it concluded with a recommendation that the Committee confirm management's action in incorporating AEFC Equities.

Consequences of AEFC's decision not to invest in Aequitas No 1

180 AEFC had thus succeeded in launching Aequitas into the private placement market without committing itself to any investment in the company, while creating the impression that there was a close relationship between Aequitas and AEFC, and that AEFC strongly supported Aequitas. Of course, this was not an outcome satisfactory to everyone, least of all the Aequitas board. At their meeting on 10 June 1986 one of the directors, Mr Donohoe, raised the question as to where AEFC now stood in relation to Aequitas. Mr Mullins gave a non-committal reply.

181 In a letter to Mr Grieve of the Sydney Stock Exchange dated 23 June 1986, evidently in response to concerns expressed about the vendor securities requirements of the listing rules, Mr Mullins described the relationship between AEFC and Aequitas as an arm's length relationship, emphasising that AEFC had not acquired shares in Aequitas. The letter claimed that Mr Mullins and Mr Rees had 'formulated the concept and entity of Aequitas' and that AEFC 'preferred the two companies to be at arm's length'. The letter gave a false impression because it understated the functional relationship which had been highlighted in Mr Gledhill's board paper.

182 This functional relationship was developed further after the float of Rendell Industries. On 29 May 1986 a Deed of Priority was entered into by AEFC, Aequitas No 1, Rendell Industries and RIH. The deed contemplated that Aequitas No 1 would make advances to Rendell Industries totalling $486,375, and would take a second equitable mortgage (after AEFC) over the assets of Rendell Industries. On 26 June 1986 Aequitas No 1 lent Rendell $250,000, secured by an equitable charge. In a file note of the same date Mr Rees recorded that 'the short term arrangement is to be channelled through Aequitas No 1 Ltd in what has become the usual manner'. The principal sum was later increased to $600,000, and Aequitas No 1 agreed that repayment would be postponed until 31 December 1986, the debt being secured by an equitable charge executed on 16 July 1996.

The capitalisation and preparations for listing of Rendell Industries

The issue of shares to Rendell employees

183 After AEFC Leasing acquired a majority interest in the Rendell group on 3 October 1985, Mr Rees set about planning the private placement of shares to employees. Evidently one of his purposes was to avoid the prospectus requirements of the Companies Code. He took advice from Holman Webb. On 18 November 1985 he wrote to Mr Griffin as managing director of Rendell Industries, confirming the steps to be taken in order to complete the issue of shares as contemplated by the Shareholders Agreement. First, senior management would be invited to subscribe up to $250,000 for 1,562,500 shares as soon as they had arranged funding. Secondly, AEFCAS would subscribe for a sufficient number of shares to enable it to direct Rendell Industries to issue one share to each employee. (It may have been thought that, once the employees became shareholders in this way, any subsequent offer of shares would be to existing shareholders and, under the law of the day, no prospectus would be required.) Thirdly, once a share had been issued to each employee, 1,562,500 shares would be offered to the employees by non-renounceable issue. AEFCAS would procure an underwriter for both tranches.

184 The plan was never fully implemented. The initial single share was issued out of the share premium account to approximately 300 employees on 5 December 1985. Those shares were distributed to employees with a covering letter from Mr Griffin dated 12 December 1985. The letter referred to the

proposed stock exchange listing and foreshadowed that employees would be given the opportunity to acquire further shares of 20 cents each, discounted to 16 cents. On 16 December 1985 Mr Griffin reported to the board of RIH that a media consultant would implement 'an incremental program of creating awareness' amongst employees so that by the end of January the staff's morale would have been 'conditioned ... to be receptive'. The company would then 'test the water' in the first week of February.

185 The documentary evidence indicates that problems with the proposed placement to employees were emerging by January 1986. In his report to the board of RIH dated 17 January 1986 Mr Griffin reported that the planned promotional campaign was continuing, but said that he expected senior executives to be 'less than enthusiastic' about the placement.

186 This lack of enthusiasm was articulated forcefully by Mr Norman Rendell. He had a meeting with Mr Rees on 12 February 1986. Mr Rendell complained that he had agreed to sell his shares on the basis that there would be a further equity injection to ensure continued viability of the business and the security of employment of the majority of the employees. In fact, he said, the sale had achieved nothing except to increase the debt burden of the organisation beyond reasonable measure. He was concerned that AEFC had subsequently sold its interest at a profit to a company that had no money. He expressed the view that a proportional equity injection by all shareholders should be made before any invitation was made to the staff to subscribe for shares. That would demonstrate the continuing interest of the majority holder. Without such a demonstration, he said, he and other senior executives would have no interest in subscribing for shares.

187 Concurrently some difficulties were emerging about the proposed flotation of the Rendell group. In a paper dated 23 January 1986 Mr Rees reported that the Second Board stock exchange was suffering from lack of trading liquidity and he hinted that a direct listing on the Primary Board or an indirect listing by reverse takeover may be preferable. Nevertheless Mr Rees met with Bache on 19 February 1986 to discuss an underwritten fundraising of $1.5 million for Rendell. What emerged were proposals, considered by the Rendell Industries board on 21 February 1986, to raise funds by a rights issue after the flotation of Rendell Industries, rather than to raise funds from employees. The new proposal was to issue some shares to selected employees out of the share premium account (perhaps this was to obtain a sufficient shareholding spread to permit listing); to create an ongoing executive share options scheme; and to make an underwritten non-renounceable rights issue of 7,950,325 shares (6.5 million shares being on issue at that time); and an option issue, which would raise $1,590,065.

188 The board meeting of RIH of 26 February 1986 was informed that 102 employees had been nominated as recipients of shares on the basis of length of service, each receiving 200 shares, but the certificates would not be issued until taxation implications had been considered. By March 1986, 100 employees had made applications for employee shares to be issued out of the share premium account. The Rendell Industries board was informed on 26 March 1986 that the only matter outstanding was for the company to obtain advice in relation to the taxation implications of issuing the shares. Evidently appropriate advice was obtained in due course and the 200,000 fully paid ordinary shares were issued to 200 employees prior to flotation.

Private placement of Rendell shares and options

189 It appears that the private placement of 1,970,000 fully paid ordinary shares of 20 cents each to professional investors was also approved in February 1986, though there is no board minute in evidence. The placement was successful and was completed by allotment on 6 May 1986.

190 It also appears that on 26 February 1986 Rendell Industries issued 3,250,325 free options to the existing shareholders, proportionately to their holdings. 2,431,873 options were issued to Aequitas No 1. On 6 May 1986 an additional 985,000 options were issued on the same terms to the investors in the private placement. The options entitled the holders to subscribe for one share per option at an exercise price of 20 cents per share. The options expired on 15 June 1989 and were first exercisable on 15 June 1986, by notice served within the preceding ten days.

191 On 26 February 1986 Bache confirmed in writing that it would underwrite the rights and options issue, on condition that the company would be first listed and its existing shares admitted to quotation. A draft information memorandum was then prepared.

The Pond Report and Mr Pond's appointment as executive chairman

192 Alan Pond had an engineering background and had worked for 20 years as managing director of Hunter Douglas, a home improvement and building company. He was appointed a director of Aequitas on 12 March 1986, as one of the 'independent' directors recruited to the Aequitas board with a view to public listing and fundraising. He was the only director of Aequitas with practical and technical knowledge of Rendell's business.

193 After his appointment to the board of Aequitas, he was immediately retained by Aequitas (through his consulting company Iluka Holdings Ltd) to provide consulting services and a report in relation to the company's investment in Rendell Industries. His report is undated but seems to have been completed late in March 1986, judging from the dates of the various exhibits to it. In the report Mr Pond noted that the proposed share float of Aequitas by way of a private placement memorandum relied heavily on its major asset, Rendell Industries. He said that the purpose of the consultancy assignment was to determine independently the present viability of Rendell and provide an assessment of its future potential.

194 Mr Pond had several meetings with Mr Griffin in which the latter explained the business and his business strategy. Mr Pond was given copies of pertinent documents, including: business strategies; budgets; board reports; and external consultant reports. They discussed the accounting policies of the group and visited some building sites.

195 Mr Pond reached a very favourable assessment of Rendell's prospects. He found that the present outlook for 1985/86 results was good, predicting a profit between $650,000 and $750,000 before tax, and he said that the short-term projections for the following year showed good growth in current contracting business and new business prospects. He observed that the funding of Rendell was of critical importance. A budget was due to be considered and its approval would be subject to funding being provided by the public float, by Rendell's shareholders (mainly Aequitas) and by Rendell's financial consultants, AEFCAS. He said that prospects for this funding appeared to be favourable. Provided funding was obtained, Rendell's future was limited only by the limitations and imagination of its management.

196 Mr Pond's assessment of the prospects of the Rendell group is surprising, given the information to which he had access. It is not easy to understand how he could have reached such positive views after reading, for example, the board papers for the directors' meeting of Rendell Industries of 5 December 1985, which (according to the index of his report) were provided to him. He was also given copies of the agreements of 3 October 1985 by which AEFC Leasing acquired the Rendell Industries shares, and therefore he was aware, or was able to find out, that AEFC Leasing paid only $250,000 for the shares. Yet he made no comment about that subject.

197 Mr Pond impressed Mr Griffin with his thorough understanding of the industry and his knowledge of Rendell. On 17 March 1986 Mr Griffin wrote to Mr Mullins recommending that Mr Pond immediately join the board of Rendell Industries, and that the board of Rendell Industries (rather than the board of RIH) should become the principal board for the group. Mr Pond met with Mr Mullins and Mr Rees on 20 March 1986 to brief them on his review. He told them he was comfortable with middle management and the employees, but saw room for improvement in senior management.

198 After that discussion there was a change to the composition of the boards of Rendell Industries and RIH, confirmed at the meeting of the Rendell Industries board on 6 May 1986. The RIH board (which was an intermediate subsidiary board) was made less significant and the Rendell Industries board (the board of the holding company of the group) was expanded and rearranged. Mr Pond became Executive Chairman of Rendell Industries, with Mr Griffin as Managing Director and Mr Mullins as Deputy Chairman.

199 Mr Pond's report was not presented to the Aequitas board until 13 May 1986, but the board was informed of its preparation at a meeting on 1 April 1986, when Mr Pond informed the board that his report was 'presently being typed', and that it would be presented at the next board meeting. On the same day the board resolved that Aequitas advance $200,000 to Rendell Industries. Aequitas No 1 advanced $486,375 to Rendell Industries pursuant to a board resolution made on 23 May 1986.

Planning for the flotation of Rendell Industries, and the rights and options issue

200 By early April 1986 Rendell Industries was planning for a public listing on 16 May 1986. On 8 April 1986 Mr Griffin wrote to Mr Rees instructing him as financial adviser to examine alternative banking and funding arrangements for the Rendell group, because Mr Austin of ANZ had been promoted and so there was no assurance that the special relationship that had existed with ANZ would continue. The letter stressed that the group's growth plans required adequate long term and short term funding. Mr Rees pursued the proposal for a preference share issue to AEFC, noting in a memorandum dated 18 April 1986 that Rendell Industries had advised AEFCAS that a standby line of $1 million in addition to present funding would be needed by 30 June. Mr Rees remarked that this would not be difficult to achieve, given the proposed conversion of options by Aequitas and the injection of placement moneys, the confirmed this view by a memorandum dated 29 April 1986.

201 In his memorandum of 29 April Mr Rees reviewed the Rendell group's banking relationships with ANZ and AEFC. He developed the argument that the quantification of AEFC's guarantee position was difficult and therefore the current funding arrangements may not be the most efficient, and that the most appropriate approach would be to negotiate with ANZ for a fixed amount for the deficiency guarantee. He believed that those negotiations should be opened after Rendell Industries had listed.

202 There was a flurry of activity when the 16 May deadline for flotation of the Rendell group approached. Final changes to the information memorandum for the float were prepared, as noted in a memorandum of a meeting of Messrs Pond, Mullins and others on 7 May 1986. The company's marketing campaign was reviewed at a meeting of the directors of Rendell Industries on 8 May 1986. But it seems that too much still needed to be done to make the 16 May deadline feasible, and it was abandoned.

203 By 20 May 1986 relations between Mr Griffin and Mr Rees (by then the managing director of Aequitas) had deteriorated substantially. On that day Mr Griffin wrote to Mr Rees to update him on the cash forecasts of Rendell Industries for the period to 30 June 1987. The tone of the letter was critical of the failure of Aequitas, AEFCAS and AEFC to provide adequate funding in the past, leading to an estimated increased cost burden of about $1 million for the current financial year and a management turnover of 50% during the year, as well as diminished confidence in Rendell which Rendell on the part of employees, suppliers and builders. He insisted that Rendell's management must have an adequate level of reliable and regular funds, with a better balanced gearing, to ensure forecast profits and growth. The letter enclosed several papers which recommended that AEFC should convert its short-term loan into a three-year loan at a more equitable rate of interest, and that Aequitas should exercise the options it held in Rendell Industries as soon as possible to improve the equity and gearing of the company as well as to provide working capital to enable budget projections to be met.

204 A new deadline was set for an information memorandum to be presented to the Stock Exchange by noon on 2 June. But even by 1 June 1986 a great deal of administrative work was needed, as recorded by Mr Griffin in his letter to Mr Pond of that date, in which Mr Griffin recommended that no application be lodged with the Sydney Stock Exchange until a long list of administrative matters had been attended to.

205 The investigating accountants delivered their report to Law & Milne, solicitors for Rendell in the float, on 2 June 1986. A covering letter recorded that the report had been amended to give effect to the receipt of 2,431,875 options (presumably this refers to the shares issued upon exercise of the options) by Aequitas No 1 on the '15th instant', thus increasing issued capital by $486,395. The report was undated and was apparently prepared in the expectation that certain transactions, including the exercise of

options by Aequitas, would subsequently take place. The date for the allotment of the 1.97 million privately placed shares was for some reason left blank.

206 In May 1986 the company had opened negotiations for a distribution agreement with Dryvit Systems Inc, a US corporation. The negotiations contemplated that Dryvit would take a placement of shares in Rendell and the president of Dryvit would join the board of directors of Rendell. The placement would not exceed 10% of the total issued capital of Rendell after the rights issue had been made. These negotiations were not finalised prior to the issue of the information memorandum, and therefore the information memorandum disclosing the negotiations had to be reviewed by Dryvit. By memorandum dated 2 June 1986 Mr Rees reviewed the position and noted the work still to be done, and noted that an executive decision had been made to lose a further week on the timetable.

207 An additional source of concern was the fate of the rights issue underwritten by Bache. In a memorandum to Mr Mullins dated 2 June 1986, Mr Rees said that it was time to indicate to the underwriters the likely take up under the rights issue. His review indicated that Aequitas and interests related to management would not take up their rights, but that employees were likely to do so to the extent of about $75,000 to $100,000. Investors in the private placement of 1.97 million shares would, he said, take up their rights.

208 On 3 June 1986 Aequitas No 1 wrote to notify Rendell Industries that it would exercise its 2,431,875 options and would pay by converting its loan to Rendell Industries in the amount of $486,375 into equity. The notice of exercise of option was subsequently submitted, bearing the date 13 June 1986.

209 Mr Rees reviewed the position of Rendell Industries in a file note dated 12 June 1986. He noted that the company owed approximately $30,000 to Law & Milne and approximately $150,000 to Charlton & Charlton (media consultants). He recorded some points made to him by Mr Griffin: suppliers were a problem and it was necessary to find $50,000 in the ensuing week otherwise no more tiles would be delivered; profit would exceed the targeted minimum of $650,000; total float costs would be approximately $250,000 but that figure had not been budgeted for; and Mr Griffin expected that approval of refinancing by ANZ would be given within the following week. Mr Rees' memorandum also shows that administrative arrangements for the float were still being completed, with some discussion as to whether the timetable could be altered.

Difficulties between Mr Pond and Mr Griffin

210 Mr Pond's appointment as Executive Chairman did not resolve the difficulties within the Rendell group, and added some new ones. He asked Mr Griffin for a report summarising the matters which were adversely impacting on Rendell's performance, and the matters that were bothering Mr Griffin in particular. Mr Griffin replied by means of a personal and confidential letter dated 2 May 1986. He said that Rendell's growth during the previous 12 months had been excellent, and that its performance had been hampered only by liquidity difficulties. He expressed the view that the company had sound plans for achievable growth, and had successfully introduced contemporary management methods. In his view Rendell had been dogged by broken commitments, irrational changes of direction, inadequate shareholder support and the creation of a highly political corporate environment, all brought about because the new owner (Aequitas) was unclear of its strategies, which were still evolving. He complained of delays in achieving listing, and the involvement of too many people in the pre-listing procedures without adequate accountability. He said that he had been excluded from discussions and decisions relating to Rendell's capital, board structure and business acquisitions. He expressed the view that decisions and strategies had been undertaken with emphasis upon Aequitas's strategic needs rather than Rendell's, creating a possible conflict of interests. Referring to difficulties raised by Mr Pond as to the respective roles of the executive chairman and managing director, Mr Griffin said that perhaps all that would be needed to remove doubts would be a board resolution to the effect that Mr Pond had been appointed executive chairman to ensure that Aequitas' interests were adequately looked after and to provide a means communication between both companies. This would leave Mr Griffin with the responsibility for executive management of the group.

211 Prior to or after the letter of 2 May 1986, the relationship between Mr Pond and Mr Griffin broke down, and Mr Pond took the view that Mr Griffin should resign. He discussed his view with Mr Mullins, and at a meeting of Aequitas board of directors on 10 June 1986, not long before the listing of Rendell Industries. At that meeting Mr Pond complained that Mr Griffin had not kept him informed about Rendell's operations, especially in relation to the financial position of the group. He said he had no confidence in Mr Griffin, and that Mr Griffin's appointment as managing director of Rendell should be terminated. Mr Mullins endorsed those comments and said he believed there had been a deliberate attempt to distance Mr Pond from the company, instigated by Mr Griffin. Mr Mullins said he no longer had confidence in the managing director.

212 In a later handwritten commentary on a minute of the Aequitas board meeting, Mr Rees said that the discussion came across as a boardroom power struggle of personalities, rather than a fundamental concern on figures and financial records, and that to sack Mr Griffin just before the float would be destabilising, in the absence of specific knowledge of wrongdoing. Perhaps for those reasons, it was decided only that Mr Griffin's performance should be closely monitored. It is probable that the events at the Aequitas board meeting of 10 June were not disclosed to Mr Gledhill until much later, since he expressed surprise when he found out, on 14 July 1986, that the services of Mr Griffin had been terminated.

The listing of Rendell Industries

213 Rendell Industries was admitted to the list of the second boards of the Sydney and Melbourne Stock Exchanges on 27 June 1986. Its information memorandum was issued on 20 June 1986.

214 The information memorandum showed that the company's issued capital was 11,102,200 shares of 20 cents each, mostly paid for by consideration other than cash. This included the options recently exercised by Aequitas No 1, but other option holders had not yet exercised their options. It stated that Aequitas No 1 held 65.71% of the issued shares, but the holding would be diluted as a result of the planned non-renounceable rights issue and the exercise of options. The rights issue would be a 3 for 4 issue with attaching options, underwritten by Bache. The funds raised would be used for formation and listing expenses, and working capital for further development and expansion of the business. A total of 6,502,744 ordinary shares and 3,251,372 options would be offered.

215 The investigating accountant's report by McClenaughan, Wilkinson & Co dated 17 June 1986, said that the operating profit of RIH before income tax for the 11 months to 31 May 1986 was $598,594, with no provision for income tax because of accumulated losses. A statement of assets and liabilities for RIH as at 31 May 1986 showed net assets of $1.4 million. A consolidated balance sheet for the group as at 31 May 1986 showed net assets of $2.747 million, and a pro forma consolidated balance sheet showing the effect of the rights issue stated the net assets to be $4.047 million.

216 The information memorandum disclosed that Aequitas No 1 had acquired the shares and options held by AEFC Leasing for $960,000 on 1 April 1986. But the document was much less clear as to the consideration provided by AEFC Leasing when it acquired its Rendell Industries shares in the previous October. Only a careful reading of the disclosure of material contracts in the section of the document dealing with 'additional information', together with the section dealing with 'share capital details', or the investigating accountant's report, would inform the reader that the consideration comprised subscription for 100 shares at a premium of $2,499 per share and AEFC Leasing's 'procuring a short-term debt facility for Rendell and further arranging for the guarantee by AEFC of certain lines of credit'.

217 The document gave a very rosy account of the business prospects of the group. The document said that because of its specialist ability, Rendell continued to be involved with some of Australia's largest and most prodigious projects, with a forward workload in excess of $17 million and active marketing of its services to ensure that budget revenue targets were met. The document set out a summary of the two-year budget forecast, painting a picture of a stronger and buoyant company with considerable growth and diversification. The disclosed loss in RIH was said to be 'due to increased interest charges on borrowing made to finance the operating losses and increased working capital requirements'. Anticipated net profit for the year ended 30 June 1986 was said to be between $650,000 and $780,000, and the budget estimate for net profit (after the absorption of tax losses) for the 1986/87 financial year

was said to be in excess of $1 million. It was recorded that the directors believed, and had every reason to be confident, that the forecasts were achievable.

218 There was no mention of the concerns, constantly reiterated in private memoranda, about cash flow and the poor relationships of the group to its builders and suppliers. There is a stark contrast, for example, between the 'business prospects' section of the information memorandum and the memorandum by Mr Rees dated 12 June 1986. It is hard to believe that the information memorandum was talking about the company so anxiously portrayed by Mr Griffin in his board reports of December1985/March 1986.

The failure of the Rendell group

219 On 30 June 1986 Mr Griffin's services were terminated. Not surprisingly, such a major corporate event, following so soon after listing, attracted comment in the financial press. It was also 'something of a surprise' to Mr Gledhill, who said (in a memorandum dated 15 July 1986) that AEFC had always been under the impression that Mr Griffin was a key element in the revival of Rendell. Mr Gledhill had expected that after the listing of Rendell on 27 June, there would be a public capital raising of $1.5 million to overcome the group's pressing liquidity problems. Obviously that prospect was fading rapidly.

220 It appears that Mr Griffin was effectively forced to resign by his co-directors. An accountant formerly employed by the Rendell group had complained to the Corporate Affairs Commission, alleging manipulation or falsification of the financial records of group companies. Mr Pond also discovered some matters that he regarded as disturbing, suggesting that Mr Griffin had deliberately withheld the true financial position of the group from its directors, and that he had embarked on very costly programs without the full knowledge and consent of the board. Arthur Young was engaged to conduct an independent audit. Mr Pond replaced Mr Griffin as managing director.

221 On 22 July 1986 Mr Mullins informed Mr Gledhill that Arthur Young had located serious errors in the Rendell group's work in progress for April/May 1996. The result was that instead of the projected profit of $750,000 contained in the Rendell offering memorandum, the true result for the year ending 30 June 1986 was a loss of $1.5 million. Recriminations were not slow in coming. At a meeting on 24 July 1986, representatives of Bache expressed the opinion that the position regarding Rendell was very serious, implying that there had been fraud, and stating that the directors of Rendell Industries could be held liable. Bache were inclined to place primary responsibility on the shoulders of Mr Mullins and Mr Rees. As Mr Gledhill remarked in a memorandum dated 24 July 1986, that did not reflect favourably on AEFC.

222 On 23 July 1986 the stock exchanges were requested to suspend trading in the shares of Rendell Industries pending a report by the directors, and they did so on 24 July. Trading was never resumed. At about the same time Mr Gledhill alerted the Chairman of AEFC to the situation; he urgently had an assessment made of AEFC's financial exposure to Rendell; and he sought advice as to AEFC's exposure to liability, and as to its ability to appoint a receiver to protect its securities. He raised the question whether AEFC should obtain a separate independent accountant's report, but decided to rely on Arthur Young.

223 The Rendell group was clearly, by early July, in a desperate financial position. Mr Pond told Mr Gledhill that the group could not continue trading unless further funds were injected in the week beginning 14 July. According to Mr Gledhill's memorandum of 15 July 1986, he made it clear to Mr Pond that AEFC was in no position to put further funds into the group and that unless Aequitas was able to assist, the directors of Rendell had little option but to 'appoint a receiver', and 'this would have horrendous implications for Aequitas which would virtually write off its investment'. He was aware that Aequitas had been placed in a difficult situation, 'being a fledgling company with funds of $2 million already being tied up in Rendell'.

224 It was indeed a difficult situation for the board of Aequitas. At their meeting on 11 July 1986, Mr Pond and Mr Mullins announced that they would resign as directors of Aequitas at the end of the meeting. They informed the board that if Aequitas would not advance further funds to Rendell, then they

would both resign as directors of Rendell, as they could not be put in the situation as directors whereby the Rendell group was unable to pay its debts as and when they fell due. It was resolved that in view of the urgent liquidity situation of Rendell, Aequitas would advance Rendell $1 million on 14 July 1986 and $0.5 million on 14 August 1986 for a period of one year, and that this loan would be subordinated to all other debts of the Rendell group. It was also resolved that Aequitas make an application to AEFC for a $2 million line of credit.

225 The meeting was not completed on 11 July (which was a Friday), and it continued on Sunday 13 July. The exact sequence of events is unclear, since the minutes are somewhat repetitive. It appears that Mr Rich explained to Mr Pond that the availability of funds to Rendell on 14 July would depend on Aequitas first obtaining a line of credit from AEFC or elsewhere. It was agreed that every effort would be made to make funds available.

226 There was a further meeting of the Aequitas board on 15 July. According to the minutes:

> 'Originally it was the recommendation of Richard Green of Bache (speaking for major shareholders) that Aequitas should fully support Rendell in meeting its debts. However, this was not the considered opinion of the Aequitas board in the absence of full information as to Rendell's financial position and particularly having regard to the need of Aequitas for prudent cash reserves and to its own financial commitments.' I infer that the board rescinded its earlier decision. The board then resolved to make a line of credit of $500,000 available to Rendell. According to the minutes, the loan was made on the recommendation of Bache so that wages could be paid, supplies obtained and time gained for completion of the Arthur Young report. The amount of the loan was subsequently increased to $600,000 to take account of the need for immediate supplies to a Canberra site of $50,000 and the accounts listed by Mr Mullins which added up to $535,000. On 16 July 1986 Rendell Industries granted an equitable charge to Aequitas No 1. It was a fixed charge as to certain assets and a floating charge as to the remainder.

227 Mr Pond purported to resign from the Rendell board as from 14 July 1986, while continuing as a consultant to the company. In a letter to Mr Gledhill dated 17 July 1986, he spoke of Rendell's fragile state but referred to the possibility of salvage, and said that Rendell was paying the price of not getting rid of Mr Griffin, contrary to advice he had given some months previously.

228 By late July 1986 Arthur Young had reached the provisional conclusion that the Rendell group was facing liquidation unless a rescue plan could be mounted. Barry Glover, former chief executive of Hooker Corporation Ltd, agreed to head a rescue plan subject to AEFC and Aequitas agreeing to certain conditions. Those conditions provided for Mr Glover's investment company, Barlile Corporation Ltd, taking 25% of Rendell for nominal consideration, AEFC and Aequitas converting their loans to equity, Barlile having an option to purchase 50% of the shareholding in Rendell exercisable within three years, and AEFC providing subordinated debt of $500,000 interest-free for 12 months and an additional facility of $1 million on existing terms and conditions for three years. Mr Gledhill reported Mr Glover's offer to the Australian Committee of AEFC, in a paper dated 29 July 1986.

229 Heads of agreement were entered into on 28 July 1986 between AEFC, Aequitas, Barlile and Rendell for a rescue plan. However, on 8 August 1986 AEFC wrote to the other parties purporting to rescind the agreement. The rescission was said to be as a result of information received by AEFC, subsequently to the heads of agreement, from officers of Rendell and Arthur Young. According to AEFC's letter, Rendell was insolvent and so some conditions precedent to the arrangements were incapable of implementation. Additionally, false representations had been made as to the financial position of Rendell (including a balance sheet claiming assets of $22 million, whereas the true asset position was approximately $4 million). AEFC claimed that there had been mutual mistakes of fact, and that the consideration it would receive in the transaction was illusory because shares to be issued by Rendell under the agreement were valueless. AEFC also alleged breach of fiduciary duty by Rendell, which was said to be in a fiduciary position by virtue of the heads of agreement and was said to have breached its fiduciary duty by not fully and accurately disclosing its financial position.

Responses to the Rendell failure within AEFC

230 Three kinds of responses were developed within AEFC after the Rendell disaster became public: enforcement of its security over Rendell assets; termination of the joint venture and dissolution of AEFCAS; and internal review of AEFC procedures.

Enforcement of AEFC's security over Rendell assets

231 After it had terminated the rescue plan, AEFC was evidently placed under considerable pressure by creditors of Rendell to support the company. One creditor contacted AEFC claiming that Mr Mullins had represented that AEFC would stand behind Rendell. Mr Gledhill issued instructions to respond to any such claim on a 'no comment' basis.

232 On 13 August 1986 AEFC exercised its security rights by appointing a partner of Arthur Andersen & Co as receiver and manager to certain assets of Rendell Industries under its equitable charge. Arthur Andersen decided that Rendell would cease trading, except for work in progress. Their preliminary assessment was that the prospect of recovery of more than 20 percent of secured indebtedness was slight, but that the final position would depend on asset realisations, the outcome of a claim by the Commissioner of Taxation and certain claims made on performance bonds. Mr Gledhill reported, accordingly, to the Australian Committee on 20 August 1986. He also noted the disagreement between AEFC and the ANZ Bank as to the scope of the deficiency guarantee.

233 Subsequently there were extensive negotiations between AEFC and the ANZ Bank with respect to AEFC's liability on the deficiency guarantee. It is unnecessary, for the purposes of this decision, to set out fully the evidence concerning these negotiations. It is sufficient to say that eventually (on 11 December 1987) AEFC and the ANZ Bank agreed to settle their dispute on the basis that AEFC would pay the bank $1.745 million. I should note that in addition to this payment, AEFC wrote off $1 million against a provision for the loss on loans to Rendell, on 30 September 1986, a further $1 million on 21 March 1988 and eventually a further sum of $500,000.

234 After Arthur Young made their preliminary report, which expressed the opinion that shareholders' funds of Rendell Industries should be adjusted downwards by $7.2 million, a provisional liquidator was appointed to Rendell Industries on 18 August 1986, less than two months after listing.

235 The receivership continued during the period 1986-88, and the receiver eventually reported in about February 1989. AEFC received regular reports from the receiver during this period, the substance of which was passed on to the Australian Committee. By November 1988 the position was that the funds available for distribution from the receivership would be $115,400 if a claim by the Commissioner of Taxation succeeded, but if the Commissioner's claim was unsuccessful, the amount available for distribution would be $629,800. There would be no funds available for the provisional liquidator.

236 In a report to the Australian Committee dated 20 October 1986, an officer of AEFC called Mr Balmforth gave an account of the work of Arthur Andersen as receivers and managers, concluding that net funds of $414,000 would be likely to result from the receivership. The report noted in passing that one of the objectives of the appointment of the receiver had been to reduce funds available to the provisional liquidator, thereby restricting the latter's ability to institute proceedings to set aside the receiver's appointment and to enforce the heads of agreement against AEFC. The report said that no surplus would be passed back to the provisional liquidator, who was inactive because of lack of funds.

Termination of the joint venture and dissolution of AEFCAS

237 A principal part of Mr Gledhill's response to the Rendell disaster, after his initial surprise, was to place considerable blame on the shoulders of Mr Mullins. In a paper dated 15 July 1986, he expressed concern that Mr Mullins had not mentioned Rendell's financial difficulties in a memorandum written by him on 9 July 1986, seeking conversion of AEFC's bridging loan of $500,000 to an increase revolving term loan of $2.5 million. He observed that 'Mr Mullins is aware that, as AEFC Advisory Services are advisers to Rendell, we are relying on him to keep us fully informed of developments'.

238 Mr Magill, an officer of AEFC, made a note on 28 August 1986 of a conversation on 27 June 1986, during which Mr Mullins was said to have remarked that there were serious management problems at Rendell and there were doubts/reservations regarding Rendell's accounts. Mr Gledhill endorsed this note on 29 August 1986, querying why Mr Mullins allowed the listing of Rendell to proceed, and saying that it was 'almost incomprehensible that Mr Mullins did not have some insight into the Rendell problems long before 27 June 1986'.

239 By August 1986 AEFC had developed plans for the termination of the joint venture. The plans included reversal of the payment of $69,400, said to have been made in error. It appears that this amount had been paid on 14 July, which was the same day Mr Mullins announced discrepancies in the Rendell accounts. Evidently someone at AEFC had told the directors of CASO not to distribute this money through family trusts, but staff of AEFC suspected that the money had been disbursed, and that Mr Mullins' share of it had been used as part of the purchase price for a house which Mr Mullins acquired. However, it does not appear that the reversal of the payment was in fact implemented.

240 A draft resolution for a proposed meeting of directors of AEFCAS referred to serious allegations made against the managing director of AEFCAS (Mr Mullins) in relation to Rendell and his failure to recognise the parlous financial position of Rendell, and loss of confidence in him in relation to the joint venture. Mr Gledhill had a discussion with Mr Mullins, without prejudice, in a final attempt to negotiate a mutually accepted termination of the joint venture.

241 The joint venture was in fact terminated, evidently by consent, on 29 August 1986. AEFC acquired CASO's shares in AEFCAS. AEFCAS was recorded as the holder of 192,500 shares in Rendell, which Mr Gledhill described in a note to a memorandum of 24 September 1987 as in the nature of a 'success fee'.

242 A memorandum by Messrs Gledhill and Magill dated 14 October 1986 for the Chairman of AEFC referred to advice from Holman Webb that 'it would be prudent to place [AEFCAS] into members' voluntary winding up as soon as possible', as the winding up might prevent future claims against the company arising out of advice given or work done. The memorandum proposed that the directors of AEFC should appoint a representative for a meeting of the shareholders of AEFCAS to resolve that the company be wound up voluntarily and that Arthur Andersen be appointed liquidator. The memorandum recommended that AEFC should proceed with the winding up of AEFCAS 'as soon as possible'.

243 AEFCAS changed its name to Terralion No 8 on 25 November 1986. According to a memorandum by Mr Magill dated 23 February 1987, the change of name, like the winding up, was undertaken as a defensive measure against claims being lodged against AEFCAS for services provided or work done.

244 An extraordinary general meeting of the members of AEFCAS resolved on 19 December 1986 that the company be wound up voluntarily. On 29 December 1986 the liquidator of AEFCAS wrote to Mr Gledhill confirming an arrangement for the distribution of the assets of AEFCAS upon payment of his fees. The final meeting of the company was held on 9 February 1987 and a return of that meeting was lodged with the Corporate Affairs Commission on 16 February 1987. Consequently, in the absence of intervention the company would be deemed to be dissolved on 16 May 1987. A concern arose in February 1987 when the Commission issued a notice for the production of books extending to AEFC and all its subsidiaries, since it was apprehended that this might lead to postponement of the dissolution of AEFCAS. But it did not, and AEFCAS was dissolved in May 1987.

Internal review of AEFC procedures

245 As one would expect, Rendell's failure had sufficiently deleterious financial consequences for AEFC, that it was noted and responded to by the company and its shareholder banks at the highest level. A person identified as 'managing director' (perhaps the chief executive of the Commonwealth Bank) wrote a memorandum dated 31 July 1986 which indicated that he had been personally involved in in damage control after Rendell's difficulties had become public. He said that Rendell's chances of survival

could not be assessed until an auditor's report became available within the next two or three weeks (presumably this refers to the report of Arthur Young). He noted that Mr Glover was of the opinion that an additional $850,000 would need to be written off. He said that he informed Mr Rich of Aequitas that AEFC's board had asked him to stress that neither AEFC nor the Commonwealth Bank of Australia would become financially involved with Aequitas if that company ran into liquidity difficulties. He said that the Mr Rich had responded that this approach was predictable and reasonable. He said that after speaking with Mr Gledhill, he had commissioned Mr Cleary (who belonged to AEFC's Corporate and International Head Office) to conduct an inspection of AEFC looking in particular at the advisory service area and the 'moral obligations that AEFC's shareholders [the Commonwealth Bank of Australia and the European banks] may have inadvertently 'assumed''.

246 Mr Cleary reported to the Chairman of AEFC, Mr Christie, on 29 August 1986, with respect to moral obligations that the AEFC shareholders may have inadvertently 'assumed'. He noted that the briefs undertaken by AEFCAS had been singularly unsuccessful, but that he had not identified any instances which might embarrass the shareholders of AEFC, except for the cases of Aequitas and Rendell. Mr Cleary reviewed the control measures over AEFCAS for protection of the interests of AEFC and the shareholders. He noted that Mr Gledhill was greatly dependent on Mr Mullins for information, and that Mr Mullins was a difficult man over whom to exercise effective control. In Mr Cleary's view, the lack of success of AEFCAS was a combination of some lack of effectiveness of Mr Mullins, unrealistic expectations on the part of clients, incorrect assumptions about likely avenues of equity capital, and lack of selectivity in taking on briefs. He said that in hindsight, Mr Gledhill would exercise closer supervision of joint ventures in future. He recommended the termination of the joint venture, and that in future AEFC should offer only a limited and highly selective corporate advisory service, as a division under the direct supervision of the general manager or his delegate.

247 Mr Cleary produced a further report, addressed to Mr Christie, who was the chairman of AEFC. After observing that no unwelcome developments or legal action had occurred since his earlier report, and that the damage to the names and reputations of AEFC and CBA through the Rendell collapse had so far been minimal, Mr Cleary reviewed procedures with respect to loan processing and other matters. He criticised the balance of AEFC's loan portfolio, which (he said) 'fell away quickly' to loans to relatively weak companies with a strong property development bias. He expressed misgivings about AEFC going down market, and identified conflicts of interest when AEFC combined equity and funding interests in property development projects. The report also criticised procedures for decision-making and the lack of talent in the staff of AEFC.

248 Both the managing director and the chairman of AEFC responded in writing to Mr Cleary's report. The managing director wrote a memorandum for the general manager (Mr Gledhill) and for the personnel division dated 22 October 1986. The document criticises Mr Kelly, who is said to have been overenthusiastic to write business without due regard, or perhaps the necessary background, for penetrating and fundamental consideration of the lending risks involved. Mr Kelly's secondment to AEFC was terminated.

249 On the same day the Chairman wrote a note for Mr Gledhill expressing disappointment that greater care had not been taken to ensure that equity investments were set up on a firmer and more commercial basis from AEFC's point of view. The Chairman expressed the opinion that AEFC, in its thrust for new business, had become involved at the low end of the market with some companies and individuals whose reputations were at best questionable. Much time and money would have been saved if fundamental lending practices had been followed. The Chairman demanded strenuous efforts directed to ridding AEFC's books of any clients whose reputations could be said to be questionable, and restricting business to first-class names in the future.

250 A note by Mr Gledhill says that he had not been consulted before the managing director and Chairman accepted Mr Cleary's report, and that some of the conclusions of the report were not based on facts.

The effect of Rendell's failure on Aequitas and Aequitas No 1

251 In April 1986, having successfully completed the private placement to investors, management and the board of Aequitas proceeded with plans for public flotation and listing on the Stock Exchange. New articles of association were adopted, and plans were made for the audit date for the investigating accountant's report to be 31 May 1986.

252 The Aequitas board had good access to information about Rendell because of the presence of Mr Pond, Mr Rees and Mr Mullins on both boards. They also had good access to information about AEFC, through Mr Mullins. When AEFC decided not to make an equity investment in Aequitas, Mr Donohoe raised the question (at the Aequitas board meeting of 10 June 1986) as to where AEFC now stood in relation to Aequitas. Mr Mullins gave a noncommittal reply.

253 Aequitas Asset Management Pty Ltd ('AAM') had been proposed in the placement memorandum as an entity which would sponsor and underwrite corporate investments, and also take positions in placements. By July 1986 AAM had negotiated to set up a share broking entity and purchase a unit trust management company called Key Securities. Mr Rees told the board on 10 June 1986 that AAM would probably need around $4-5 million of equity to become fully operational. His report to the board meeting of 11 July 1986 set out a plan for raising capital for AAM, on a basis that would require Aequitas to invest $750,000 in equity and $1.25 million in short-term debt, but prevent AAM from being a subsidiary of Aequitas. The plan involved granting options and issuing contributing shares. One of the investors was to be Cascade Finance Pty Ltd, which was also engaged to provide consulting services in respect of 'business development opportunities' for AAM.

254 In his report as managing director for the Aequitas board meeting of 11 July 1986, Mr Rees gave an account of progress towards implementation of various strategies. His report set out some figures as to usage and commitment of funds raised to that time. He said there was a small uncommitted balance of funds, not sufficient to cover potential loan positions to Rendell and another proposed borrowing company. He suggested it was necessary for Aequitas to begin a borrowing programme. He noted that Rendell Industries had been listed on 27 June 1986, but there had been subsequent material events, as to which he was preparing a separate report. He noted that there would be increased involvement by Arthur Young in coordinating the prospectus and helping to structure AAM. A draft investigating accountant's report had been prepared for the prospectus, which did not consolidate the Rendell investment.

255 Evidently the financial crisis at Rendell came to be known to the directors of Aequitas by the time they met on 11 July 1986. As I have indicated, the board initially resolved to provide finance to Rendell of $1.5 million, and then they rescinded that decision and made available only $600,000. At their meeting on 15 July 1986, they instructed Mr Green of Bache to endeavour to find a buyer for Rendell Industries or Aequitas No 1, and to investigate the possibility of a reverse takeover of Aequitas. Effectively, the plans for a public share offer and flotation of Aequitas had been shelved, in view of the position at Rendell.

256 The board subsequently authorised Aequitas to enter into the heads of agreement with Mr Glover's Barlile Corporation. However, after AEFC appointed a receiver to some of the assets of Rendell Industries, the board resolved to rescind the heads of agreement. On 13 August 1986 the board authorised the company to be a plaintiff in proceedings for the appointment of a provisional liquidator to Rendell. Subsequently they took advice from Law & Milne as to their available courses of action with respect to Rendell, and in due course they resolved to make a demand on, and take proceedings against, AEFC, AEFC Leasing and Mr Gledhill.

Claims and legal proceedings

257 Bache commenced proceedings against the company and certain of its officers, and the company's auditors, quite soon after the Rendell collapse. The evidence does not indicate the outcome of those proceedings.

258 On 17 September 1991 Aequitas wrote to Mr Gledhill regarding Rendell. The letter referred to the purchase of shares in Rendell and put him on notice that Aequitas had grave concerns regarding certain aspects of that transaction and the involvement of AEFC and the Commonwealth Bank of Australia. The letter referred to a written opinion from counsel stating that Aequitas No 1 had a strong cause of action against AEFC for at least, but not limited to, $710,000 plus interest. The letter said that on the basis of this advice, the board of Aequitas No 1 felt duty-bound to pursue the matter. The letter proposed a meeting in a bid to resolve the matter without litigation. The matter was not resolved and the present proceedings ensued.

259 Other proceedings were commenced in this Court with respect to the subject matter of the present action. The other proceedings are No 5874 of 1991, commenced by a statement of claim filed on 25 November 1991. The plaintiffs in those proceedings are AEFC, AEFC Leasing and Mr Gledhill. The defendants are Mr Mullins, Mr Rees, Mr Griffin, Mr William Rendell, and the accountants McClenaughan, Wilkinson and Bonner. The statement of claim alleges negligent advice, including misrepresentations to the effect that investment in Rendell would be worthwhile, advice about restructuring the transaction, representations that Rendell was financially viable, and advice about the desirability of selling to Aequitas No 1. The damages claimed include the amount paid by AEFC to ANZ under the deficiency guarantee, the writing off of debts in the sum of $2.5 million, and any liability that may arise in the present proceedings.

260 As to the latter point, the statement of claim alleges that if (which is denied) the plaintiffs are liable to Aequitas and Aequitas No 1 for participating in breaches of fiduciary duty by Mr Mullins and Mr Rees as pleaded in the statement of claim of the present proceedings, the plaintiffs in those proceedings say that Mr Mullins and Mr Rees are liable to indemnify and/or contribute to any liability so arising. Similarly if the plaintiffs are found to be liable in the present proceedings for breach of a duty of care, they say that they were relying on the defendants to provide accurate and full information concerning the transactions and there was a duty of care that has been breached.

What did AEFC and AEFCAS know about the financial plight of Rendell group at the time of the purchase of shares by Aequitas No 1, and the issue of the Aequitas private placement memorandum?

261 It can be taken that AEFCAS knew what was known by Mr Rees, and AEFC knew what was known by Mr Gledhill. It emerged in July 1986 that Mr Griffin had misled the Rendell boards, and that the true financial position of the Rendell group was much worse than he had told the boards. I infer that Mr Gledhill and Mr Rees, and therefore AEFC and AEFCAS, were just as much misled by Mr Griffin as were the directors (other than Mr Rees) of the Rendell boards and Aequitas.

262 However, Mr Rees and Mr Gledhill did have the information about Rendell's difficulties that was provided to the boards. By 12 March 1986 (the approximate time of issue of the private placement memorandum), this information disclosed that the Rendell group had experienced severe cash flow difficulties throughout the period from the commencement of involvement of AEFCAS with the group. Much of the information related to cash flow difficulties which, though serious, could be overcome by the injection of adequate equity or loan funds. However, there was also some information going beyond cash flow difficulties. By mid-March 1986 it had become clear that the Rendell group had reduced its business by declining to tender for certain kinds of work; that it had reduced its staff; that by pressing to recover unpaid accounts it had antagonised builders for whom it worked, including its major customer; and that it had encountered significant problems at some sites.

263 This was information about emerging business issues which might impact upon the achievement of the budgets and profitability of the group. The significance of the information needed to be assessed by an expert in Rendell's business and industry rather than an expert in financial analysis. Mr Griffin, who knew Rendell's business very well, provided such assessments regularly. Mr Pond was an expert in the building industry. It is significant that, although he was supplied with the documents (principally board papers) that contained the information to which I have referred, he was able to make a strongly positive assessment of the prospects of the Rendell group in March 1986, concluding that the 1985/6 profit before tax would be between $650,000 and $750,000. It is also significant that in their report of 12

March 1986, Arthur Young noted without disagreement that Aequitas had recently revalued the Rendell shareholding by $72,000.

264 The knowledge about the Rendell group that was accumulated by Mr Rees and Mr Gledhill during the period from July 1985 to March 1986 told them, in short, that Rendell had serious and recurring cash flow difficulties of a kind that could be alleviated by a substantial injection of equity or loan capital, and that there were some emerging business issues that had not yet impacted upon profits. But given the favourable expert assessments by those who were knowledgeable in the business, and the fact that both the ANZ Bank and AEFC had provided loan funds during that time, they were not on notice that the group was insolvent.

265 I accept that Mr Gledhill subjectively believed, on 25 November 1985 when the sale agreement was executed, that the price to be paid by Aequitas No 1 was a fair price, and that there was a probability that the market price of Rendell Industries shares would exceed the price paid after listing. But even then, developments within the Rendell group should have made him apprehensive (see, for example, Mr Kelly's memorandum dated 14 November 1985). Developments shortly after execution of the sale agreement should have caused him serious concern. The Rendell group's difficulties were sufficiently acute that, in my view, a reasonable person in the shoes of Mr Rees or Mr Gledhill would have had serious concern as to the insolvency of the group, as from the financial crisis of early December 1985.

266 These conclusions have particular implications for two matters: namely, the veracity of the calculations by Mr Rees of the value of the Rendell group; and the adequacy of the disclosure in the Aequitas private placement memorandum.

267 As to the first matter, Mr Rees made several calculations of the value of the Rendell group during the period from July to December 1985, as I have noted. In July 1985 his view was that, once the group had been adequately financed by AEFC, it would have a value of between $1.3 million and $1.7 million. According to his calculations made in July 1985, to which he subsequently adhered, if AEFC Leasing's 74.8% interest was diluted to 50.5% by the issue of shares to employees, it would be worth $910,000. Mr Mullins and Mr Gledhill were aware of these calculations. Mr Gledhill acted upon them, for the purpose of recommending the acquisition of Rendell Industries shares to AEFC's chairman and then authorising the transaction, and also for the purpose of lending decisions.

268 The defendants have urged me to find that the views expressed by Mr Rees on the value of the Rendell group amounted to a 'bona fide and considered view' shared by Mr Gledhill. I have no reason to doubt that the views expressed by Mr Rees in July 1985 were genuinely held by him at that time, and that he believed he had calculated the value of the group in good faith on the basis of reliable information - nor that he adhered to this belief until March 1986 or even later, notwithstanding the financial crisis of early December 1985 and later events. It was open to him to believe that the events that had occurred since his various valuations of the Rendell group had not provided a good reason for him to change his valuation opinion, but the assumptions upon which his valuation opinion was based would need to be carefully stated or else the opinion would be misleading. If he were asked to expand his valuation into a comment on the prospects of the group, it would have been incumbent upon him to explain that the group's future viability depended on the accuracy of the information supplied by Mr Griffin, and on the assumption that adequate funding would be available to avoid future cash flow problems. The greater the grounds for serious concern as to the group's future prospects, the more meticulous the qualifications to the opinion would have to be. In other words, the objective basis for serious concerns about the future of the group should have made him extremely careful about any information he supplied about the group.

269 Mr Gledhill was aware of the valuation opinions by Mr Rees that had been made available to AEFC, and appears to have believed them, and to have understood the assumptions and qualifications upon which they were based. That being so, the existence from December 1985 of an objective basis for serious concern about the prospects of the Rendell group should have made him, like Mr Rees, extremely careful about any information he supplied about the group. However, in Mr Gledhill's case there was an additional reason for concern about expressions of valuation by Mr Rees, arising out of the conflicts of interest to which Mr Rees was subject.

270 Mr Rees was subject to acute conflicts of interest during this period, which were a substantial obstacle to his making an objective assessment, and accurate disclosure, of Rendell's prospects. As a consultant working for the joint venture, whose success depended on AEFC, it was in his interest to make the joint venture look good in the eyes of AEFC, by delivering a substantial profit to AEFC Leasing on the Rendell transaction. That depended on persuading AEFC that the cost of acquisition of the Rendell Industries shares was well below their true worth. As an adviser to Aequitas, it was in his interest to support the acquisition of the shares at a much higher price by demonstrating that the price represented fair value. As an adviser to the Rendell group, it was in his interest to support a positive valuation in order to show that his restructuring strategy was working.

271 I regard as significant, for the purposes of these findings, the events surrounding termination of the retainer of Turner. Mr Rees was present at the board meeting of Rendell Industries on 5 December 1985 when the decision was made to terminate Turner's brief. Mr Turner wrote to Mr Kelly on 24 December 1985, and it is probable that the substance of that letter was communicated to Mr Gledhill. As I have said, the circumstances surrounding termination of the brief provide a ground for strong suspicion that the true reason for cancellation of the retainer was Turner's low estimate of the Hurstville property's value. A reasonable bystander would have been concerned that the valuation of the Rendell group may have been overstated, and would have expected a new independent valuation to be prepared.

272 I turn to the second matter. Mr Rees was closely involved in the preparation of the Aequitas private placement memorandum, and in reviewing it as a director of that company. The objective basis for serious concerns, to which I have referred, should have made him extremely careful about the document's disclosure of the prospects of the Rendell group. Instead, he allowed the document to go forward with a glowing account of Rendell Industries' financial position and future, without insisting that the disclosure be supplemented by an account of the matters of concern which had been disclosed to the Rendell boards and to him personally.

273 Mr Gledhill was not directly involved in the preparation and issue of the Aequitas private placement memorandum. However, he knew that Aequitas was to issue a private placement memorandum to attract external investors, and that by far the most substantial asset of Aequitas was its holding (through Aequitas No 1) of Rendell Industries shares. He was also aware of the various positions occupied by Mr Rees, and should have realised that those positions placed Mr Rees in a position of acute conflict of interest. He had knowledge of these matters in his position as general manager of AEFC, and therefore AEFC had the same knowledge. For reasons I shall explain, AEFC as a member of the joint venture that provided financial and corporate advice to Aequitas, and as a promoter of that company, owed it fiduciary duties. In all these circumstances, AEFC was in a position to insist, through Mr Gledhill, that an independent review of the valuation of Aequitas be prepared, and that the Aequitas private placement memorandum be drafted to reflect the conclusions of that independent review.

274 Mr Pond's report cannot be regarded as the independent review that should have been undertaken before the issue of the private placement memorandum, for at least two reasons. First, Mr Pond was not required to review specifically the valuations of the Rendell group that have been made by Mr Rees. Secondly, although the dates are not entirely clear, it appears likely that the private placement memorandum was issued and distributed on or shortly after 12 March 1986, and Mr Pond's report was probably not completed until late in March. It was not considered by the Aequitas board until 13 May 1986. I find that the Pond report was not available (and was therefore not in fact relied upon by the drafters) until after the private placement memorandum had been issued and significant investments had been made in reliance upon it.

275 I do not find that Mr Gledhill actually disbelieved the contents of the private placement memorandum at the time of its issue, or that he was recklessly indifferent as to its truth or falsity. My finding is that at the time of distribution of the private placement memorandum, Mr Gledhill was aware of serious grounds for concern about the future solvency of the Rendell group, and that he did not instigate or require any further inquiries as to the financial position and valuation of the group before the private placement memorandum was issued, notwithstanding that (to his knowledge) the document contained a positive assessment of the Rendell group and a supportive letter by him as general manager of AEFC.

The plaintiffs' causes of action

276 In their further amended statement of claim, filed pursuant to an order made by me on 24 June 1999, the plaintiffs put forward causes of action that rely upon:

- breach of the fiduciary duty of financial advisers,
- breach of directors' duties,
- breach of promoters' duties,
- unlawful payment of a secret commission,
- knowing involvement by the defendants in breaches of fiduciary duties by Messrs Mullins and Rees,
- the tort of deceit, and misleading or deceptive conduct under s 52 the Trade Practices Act or s 42 of the Fair Trading Act,
- conspiracy,
- negligence, and
- breach of an implied term of a contract.

The defendants deny that they are liable on any of these grounds. I shall consider each ground in turn. However, since there are some recurring issues with respect to the application of the equitable grounds of liability, I shall first make some observations and findings about the equitable obligations generally.

277 Later in this judgment I shall find that AEFC breached the fiduciary duty of a corporate and financial adviser, that AEFC and AEFC Leasing breached their fiduciary duty as promoters, and that AEFC Leasing paid a bribe or secret commission to AEFCAS for the benefit of AEFC. The payment of a bribe is, relevantly, a form of breach of fiduciary duty. My findings as to these three breaches of fiduciary duty raise some common questions, as follows:

- What is the content of a fiduciary duty - do fiduciary duties go beyond the negative duties to avoid conflicts and unauthorised profits, to the positive duties to act in good faith in the interests of the principal, and with prudence, and to make accurate and full disclosure?

- In a case such as the present, where the principal is a fledgling company under the control of its promoters, whose informed consent should be obtained to avoid breach of fiduciary duty?

- Should the knowledge and consent of Messrs Mullins and Rees be attributed to Aequitas and Aequitas No 1 in the present case?

I shall consider these common questions before turning to the individual equitable duties.

The content of fiduciary duties

278 The further amended statement of claim pleads that Mr Gledhill, AEFC and AEFCAS owed fiduciary duties to Aequitas and Aequitas No 1 by reason of Aequitas retaining AEFC by its agent AEFCAS, to provide corporate and financial advice. The pleading sets out the content of the fiduciary duty, evidently relying on the observations of Brennan J in *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 370, 385. His Honour said:

> 'Whenever a stockbroker or other person who holds himself out as having expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises. The adviser cannot assume a position where his self-interest might conflict with the honest and impartial giving of advice: see *In re a Solicitor; Ex parte*

Incorporated Law Society [1894] 1 QB 254, 256; *Armstrong v Jackson* [1917] 2 KB at 824-5.
'The duty of an investment adviser who is approached by a client for advice and undertakes to give it and who proposes to offer the client an investment in which the adviser has a financial interest, is a heavy one. His duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision including the identity of the buyer or seller of the investment when that identity is relevant, to give the best advice which the adviser could give if he did not have but a third party did have a financial interest in the investment to be offered, to reveal fully the adviser's financial interest, and to obtain for the client the best terms which the client would obtain from a third party if the adviser were to exercise due diligence on behalf of his client in such a transaction. Such a duty has been established by authority: see *Haywood v Roadknight* [1927] VLR 512 and the cases therein referred to at p 521, especially *Gibson v Jeyes* (1801) 6 Ves Jun 266, 271, 278 [31 ER 1044, 1046-7, 1050] and *McPherson v Watt* (1877) 3 App Cas 254, 266.'

279 Thus, the plaintiffs' pleading asserts fiduciary duties to

(a) furnish Aequitas with all relevant knowledge which the fiduciaries possessed, concealing nothing that might reasonably be regarded as relevant to the making of an investment decision;

(b) give Aequitas the best advice which they could give if they did not have, but the third party did have, a financial interest in a proposed investment;

(c) reveal fully their respective financial interests in a proposed investment;

(d) obtain from a third party the best terms which Aequitas would obtain from a third party if AEFC, by itself or by its agent AEFCAS were to exercise due diligence on behalf of Aequitas in such a transaction;

(e) disclose information in their possession which would indicate that a transaction was likely to be a most disadvantageous one from Aequitas' point of view;

(f) make a full and accurate disclosure of AEFC's own interest in the transaction; and

(g) make full and accurate disclosure of any improper inducement that was to be paid to AEFCAS or any person who was a director of AEFCAS or any entity in which any such person had an interest.

280 It will be seen that the pleading closely tracks Brennan J's remarks. Analytically, the pleading asserts positive duties of two kinds: duties to disclose various sorts of information (paragraphs (a), and (c), (e), (f) and (g)), and duties to act in the best interests of another in the provision of advice (paragraphs (b) and (d)). The pleading does not expressly articulate the negative fiduciary duties of avoiding positions of conflict between interest and duty or between duties, and avoiding any unauthorised profit.

281 The defendants submit that none of the positive duties alleged in the pleading is properly to be described as a fiduciary duty. The only fiduciary duties, they say, are the negative duties, and these are not pleaded. Disclosure of information, leading to informed consent, may absolve a fiduciary from what would otherwise have been a breach of duty, but (the defendants submit) there is no fiduciary duty of disclosure as such.

282 The defendants' point is not merely pedantic. If the positive duties are not fiduciary duties, their true source may be in contract or tort. As we shall see, the measure of recovery at common law differs from the measure of recovery for breach of fiduciary duty in equity.

283 It may seem surprising that a pleading based closely on Brennan J's considered words should be challenged as misconceiving the nature of fiduciary duties. But judicial thinking about the content of fiduciary duties has changed significantly over the last decade, especially in cases where the fiduciary and the principal are in a contractual relationship, or where the fiduciary owes the principal a duty of care. In England, courts have resisted the idea that there is a special standard of care for fiduciaries, to which a special equitable measure of damages is attached: for example, *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761; *White v Jones* [1995] 2 WLR 187. In Australia, after acknowledging the co-existence of contractual and fiduciary rights in *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41, the High Court has decided to confine the fiduciary component of the overall relationship to a number of specific duties: *Breen v Williams* (1986) 186 CLR 71. The question in that case was whether a patient had the right to demand access to her medical records. In *McInerney v McDonald* [1992] 2 SCR 138, the Supreme Court of Canada had held that a patient was entitled to access to medical records partly because the doctor-patient relationship is fiduciary. The High Court rejected that reasoning.

284 In the High Court's view, the essential fiduciary obligations were to avoid conflicts between interest and duty or between duty and duty, and profits arising out of the fiduciary office, in the absence of fully informed consent. Obligations to act in the interests of another, or to act prudently, are not fiduciary obligations. According to Dawson and Toohey JJ (at 93), what the law extracts from a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that. Gaudron and McHugh JJ (at 113) held that a fiduciary is obliged not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict, but 'the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed'. Gummow J (at 137) said that the special position of the trustee does not provide a proper foundation for 'the imposition upon fiduciaries in general of a quasi-tortious duty to act solely in the best interests of their principals'. Fiduciary obligations often arise in cases where one person is under an obligation to act in the interests of another, but that does not mean that the obligation to act in the interests of another is a fiduciary obligation.

285 In fiduciary law, 'informed consent' is 'an answer to circumstances which otherwise indicate disloyalty, not a mainspring of equitable liability': *Breen v Williams*, at 125 per Gummow J; see also *Maguire v Makaronis* (1997) 188 CLR 449, 467 per Brennan CJ, Gaudron, McHugh and Gummow JJ. Australian law is to be contrasted with the law of the United States, where 'informed consent' represents some assumed synthesis between the tort of negligence and principles of fiduciary duty law giving rise to a 'free-standing' action in damages.

286 The reasoning in *Breen v Williams* is quite a distance away from Brennan J's dictum in *Daly v Sydney Stock Exchange*, and yet *Daly v Sydney Stock Exchange* was cited by Gummow J (at 134) without any hint of disapproval. It would be possible to reconcile the cases by orienting each case to its facts, on the basis that the doctor-patient relationship is less comprehensively fiduciary than the financial adviser-client relationship. But that distinction would not give effect to the conceptual analysis which found favour with five of the six judges who decided *Breen v Williams*. The logic of their analysis is that most of the observations of Brennan J do not relate to the fiduciary character of the adviser's position.

287 In my opinion, in light of the reasoning in *Breen v Williams*, Brennan J's dictum should be taken to refer, for the most part, to the contractual aspects of the adviser-client relationship. The duty to provide 'best advice' and to disclose knowledge and information arise out of the adviser's 'undertaking', and are

therefore implied terms of the contractual retainer. And disclosure may also relieve the adviser from the fundamental fiduciary duty not to 'assume a position where his self-interest might conflict with the honest and impartial giving of advice'.

288 On this reasoning, the further amended statement of claim is defective, in that it fails to plead expressly the central fiduciary duty and its breach, and wrongly treats various contractual duties as fiduciary. However, I take the view that it is open to the Court, on the pleadings, to find that there was a breach of the central fiduciary duty. That finding emerges from the pleaded facts, and does not raise any new issues of fact. The conflict of interest is inherent in the retainer of the joint venture to provide advice at a time when it was in the personal interests of AEFC and Messrs Mullins and Rees that the sale of the Rendell Industries shares should go ahead.

289 *Whose informed consent would avoid breach of fiduciary duty by AEFC and AEFC Leasing?*

290 The central facts in this case are that the breaches of fiduciary duty occurred at a time when Aequitas and Aequitas No 1 were owned by Messrs Mullins and Rees and their wives, and Mr Elvy, and were effectively controlled by Messrs Mullins and Rees. The interests which the law of fiduciary duties should protect in such circumstances are not the interests of the present shareholders, but the interests of the investors who acquire shares during or after the promotion and flotation of the company. The law of promoters' duties is the most developed in this area. In principle, however, there is no difference in this respect between the informed consent needed in the case of the promoter, and the informed consent needed to relieve a financial adviser of a fiduciary duty or to avoid a secret commission or bribe, where the relevant duty is owed to a fledgling company controlled by persons connected with the fiduciaries.

Discharge of the duty by informed consent

291 The fiduciary duty of promoters may be discharged by obtaining the informed consent of a fully independent board of directors, once such an independent board has been appointed. In *Erlanger's* case Lord Cairns LC described the position of promoters with reference to their company as follows (at 1236):

> 'They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made.'

292 The company's approval may be given by an independent board of directors, as envisaged by Lord Cairns. However, it has been recognised ever since *Salomon v Salaman* [1897] AC 22 that disclosure to the shareholders is equally effective. Lindley MR observed in *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, 426 that 'after *Salomon's* case I think it impossible to hold that it is the duty of the promoters of a company to provide it with an independent board of directors if the real truth is disclosed to those who are induced by the promoters to join the company'. But disclosure to the initial shareholders, the 'cronies' of the promoters, is obviously inadequate. In *Gluckstein v Barnes* [1900] AC 240, Lord Halsbury said (at 247) that it would be 'too absurd' to suggest that disclosure to the very people who were working to hoodwink the shareholders would be treated as disclosure to the company.

293 Professor LCB Gower (*Principles of Modern Company Law*, see now 6th ed by PD Davies (1997), 134) summarised the law in a passage with which I respectfully agree:

> 'The position therefore seems to be that disclosure must be made to the company either by making it to an entirely independent board or to the existing or potential members as a whole. If the first method is employed the promoter will be under no

further liability to the company, although the directors will be liable to the subscribers if the information has not been passed on in the invitation to subscribe; indeed, if the promoter is a party to this invitation, he too will be liable to the subscribers. If the second method is adopted disclosure must be made in the prospectus, or otherwise, so that those who are all or become members, as a result of the transaction in which the promoter was acting as such, have full information regarding it. A partial or incomplete disclosure will not do; the disclosure must be explicit.'

294 Where the relevant duty is owed to a fledgling company with no independent board or external shareholders, it would be just as absurd to suggest that disclosure to the cronies of a financial adviser, or of the recipient of a secret commission, would exonerate the adviser or donor of the payment, as to suggest that disclosure to the cronies of the promoter would exonerate the promoter. In my opinion, therefore, these principles apply to all the breaches of fiduciary duty that I have found to have taken place (including the payment of the secret commission).

295 In the present case there was no fully independent Aequitas board at any relevant time. Accurate and full disclosure to the board after the appointment of some independent directors in March 1986 would not have sufficed, because some non-independent directors remained at that stage. But accurate and full disclosure to the board was, in my opinion, nevertheless required, because the directors were responsible for the distribution of the private placement memorandum and the fundraising process, and were entitled to be given all the information relevant for those purposes. Therefore, in this case fully informed consent could be achieved only after accurate and full disclosure to the Aequitas board after the appointment of the independent directors, coupled with accurate and full disclosure in the private placement memorandum.

296 *Can the knowledge and consent of Messrs Mullins and Rees be attributed to Aequitas and Aequitas No 1?*

297 The defendants submit that there can be no breach of fiduciary duty or secret commission in the present case because Messrs Mullins and Rees were aware of all relevant facts regarding the share transaction, the alleged secret commissions and the financial situation of the Rendell group at all relevant times. In my opinion, the short answer to this submission is that the law requires disclosure to and consent by a fully independent board or external shareholders before it will regard the fiduciary as absolved. It is therefore not necessary to consider the principles that would apply if the company was not a fledgling. However, there has been full argument on the point, and I shall express my view, in case I am wrong on the proposition just stated.

298 Mr Rees was well aware of the facts relating to the breaches of fiduciary duty. He was the managing director and chief executive officer of Aequitas at the relevant time. Therefore, in the defendants' submission, his knowledge was the knowledge of Aequitas. This was either because he was the directing mind and will the company, or because the company is treated as having his knowledge because he was an executive director of the company with authority to receive information for the company on matters concerning its affairs. I shall consider each limb of this submission.

299 The concept of the directing mind and will is used in company law (typically where the court's task is to apply general statutory language to a body corporate) so as to treat the conduct of an individual as the conduct of the company that he or she controls. The concept becomes relevant, typically in the criminal law (cf *Beach Petroleum NL v Johnson* (1993) 115 ALR 411, 571), if it is necessary to attribute some conduct to the company as an entity, rather than to treat it as vicariously liable for the conduct of its agent.

300 Thus, in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 the statutory question was whether damage had occurred without the 'actual fault or privity' of the owner of the ship. The owner being a company, the House of Lords held that if the individual who was the directing mind of the company had been at fault, the company could not dissociate itself from him so as to say that there was no actual fault or privity on the part of the company. In *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 the question was whether a company owning supermarket stores could invoke a statutory defence to a charge brought under the Trade Descriptions Act 1968 (UK) by proving, inter alia, that the commission of the offence was due to the act or default of another person, the other person being a store

manager who was not a director of the company. It was held that the store manager was 'another person' for the purposes of the statutory defence. In *Bernard Elsey Pty Ltd v Commissioner of Taxation* (1969) 121 CLR 119, where the company existed simply to do the bidding of an individual and he personally carried out its undertakings, the High Court concluded that his mind was the company's mind; accordingly when the statutory question related to the purpose of the company, it was the individual's purpose that was to be ascertained. In *Hamilton v Whitehead* (1988) 166 CLR 121 it was held that the managing director of a company was the company for the purpose of advertising and dealing in contravention of the fundraising provisions of the Companies Code. In the circumstances, his mind was the mind of the company, and when he acted in contravention of the Code the company was liable as a principal, directly rather than vicariously.

301 It has not been not established that Mr Rees was the 'directing mind and will' of Aequitas in any sense relevant to this case. Although he was the manager director and chief executive of Aequitas from October 1985, he was not in a position of autonomy, since he worked with Mr Mullins, who was in some ways senior to him. Thus, Mr Mullins rather than Mr Rees was the person to whom Mr Gledhill primarily looked for information and advice about joint venture affairs, and it was Mr Mullins' company, CASO, that was the joint venturer with AEFC. It is probable, in my view, that the relationship established by these facts extended to the conduct of the business and affairs of Aequitas. In reaching this conclusion, I accept that an individual may be the directing mind and will of a company within a limited field of operation. My finding is that, on the limited evidence before me on this point, Mr Rees was not, because of his relationship with Mr Mullins, the directing mind and will of Aequitas in respect of any field of its operations.

302 However, it is not necessary to decide that Mr Rees was the directing mind and will of Aequitas in order to reach the conclusion for which the defendants contend. It is enough, for the purpose of deciding whether Aequitas had knowledge of the matters relevant to the breaches of fiduciary duty, to ascertain whether knowledge was possessed by an agent of Aequitas acting non-fraudulently within the scope of his or her authority: cf *Beach Petroleum* at 571. In other words, a 'vicarious' attribution of knowledge is enough, for present purposes.

303 According to *Bowstead & Reynolds on Agency* (16th ed, 1996) Article 97:

> '(1) A notification given to an agent is effective as such if the agent receives it within the scope of his actual or apparent authority, whether or not it is subsequently transmitted to the principal, unless the person seeking to charge the principal with notice knew that the agent intended to conceal his knowledge from the principal.
> (2) The law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which his agent acquires or obtains while acting as such agent.
> (3) Where an agent is authorised to enter into a transaction in which his own knowledge is material, or where the principal has a duty to investigate or make disclosure, the knowledge of the agent may be attributed to the principal whether it was acquired in connection with the agency or not.'

304 The information acquired by Mr Rees about the breaches of fiduciary duty was relevant to Aequitas because it potentially affected the net amount of the purchase price that Aequitas No 1 would eventually be required to pay for the Rendell Industries shares. It was within the actual authority of Mr Rees as managing director to investigate and receive information relevant to such a matter. Consequently, subject to the question of fraud, the knowledge of Mr Rees about the breaches of fiduciary duty should be attributed to Aequitas under Bowstead's first and second principles.

305 There is a principle emerging from cases such as *Re Hampshire Land Co* [1896] 2 Ch 743, 749 and *JC Houghton & Co v Nothard, Lowe & Wills Ltd* [1928] AC 1, 14-15, to the effect that the knowledge of a corporate agent is not attributed to the company if the agent is engaged in a fraud on the company. In the *Beach Petroleum* case, von Doussa J expressed the principle in this way (at 574):

> 'Provided that the director is acting within the scope of his or her authority, in civil proceedings the state of mind of a director ordinarily will be attributed to the company where there is a duty on that director to communicate his or her knowledge to the company. The exception to this rule is where the director is acting totally in fraud of

> the company, that is where all the director's activities are directed against the interests of the company, and not partly for the benefit of the company. If the director is guilty of fraudulent conduct which is not totally in fraud of the corporation, and by design or result the fraud partly benefits the company, the knowledge of the director in the transaction will be attributed to the company.'

306 In my opinion, Mr Rees was acting, in respect of the share transaction, 'totally in fraud of' Aequitas and Aequitas No 1, for the purposes of this principle. The 'fraud' of which von Doussa J speaks is capable of including equitable fraud arising out of a breach of fiduciary duty, in my opinion, at least where the fiduciary's conduct is morally reprehensible. Messrs Rees and Mullins had deliberately placed themselves in a position of serious and irretrievable conflict of interest. They had undertaken, on behalf of AEFCAS and the joint venture, to provide corporate advice to the Aequitas group. They were obliged by that undertaking to provide corporate advice to Aequitas in respect of the purchase of the Rendell industries shares. They were aware that the purchase price was very substantially higher than the amount paid by AEFC Leasing only seven weeks earlier. They were also aware that the final price included $50,000 which would be treated as a fee to AEFCAS passed through the joint venture accounts. Although they believed that the shares would be worth more than the amount paid by Aequitas No 1 once they were quoted on the stock exchange, their belief was affected by their position of conflict, which they did not address by providing Aequitas with all information material to the investors' decision. The conduct of Messrs Mullins and Rees in respect of the share transaction was therefore in fraud of Aequitas and Aequitas No. 1.

Breach of the fiduciary duty of financial advisers

The scope and nature of the duty

307 The fiduciary relationship between financial adviser and client arises because the financial adviser, having held itself out as an adviser on matters of investment, undertakes a particular financial advisory role for the client: *Daly v Sydney Stock Exchange Ltd*, 160 CLR at 377 per Gibbs CJ; 384-5 per Brennan J. The advisory fiduciary relationship may arise whether or not there is an anterior fiduciary relationship between the parties, such as the relationship of broker and client. The relationship can arise even where parties are dealing with one another in a transaction in which the adviser has an obvious commercial self-interest. Thus, 'a bank may be expected to act in its own interests in ensuring the security of its position as lender to its customer, but it may have created in the customer the expectation that it will nevertheless advise in the customer's interests as to the wisdom of a proposed investment': *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 391. But unless there is, in all the circumstances, the requisite undertaking, the adviser is under no fiduciary duty and is free to pursue its own interests: *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, 15-17.

308 In some cases, a breach of duty arises because the adviser assumes duties to two sets of clients who have conflicting interests. As the Full Federal Court said in *Commonwealth Bank of Australia v Smith* (at 392), 'not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements'. The Court explained that the reason for the rule is that where there are multiple engagements, 'the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in the other'. The prohibition is not against the making of a profit, but the avoidance of conflict of duties, in the absence of fully informed consent. The Court added that if an adviser in a sale is also the undisclosed adviser of the purchaser, an actual conflict of duties arises.

309 I have found that Aequitas engaged AEFCAS, which acted as manager for the joint venture, to provide corporate advice on matters including the acquisition and financing of the purchase of Rendell Industries shares from AEFC Leasing. The venturers, AEFC and CASO, were liable as principals to supply AEFCAS with corporate advice on these matters, through the personnel of the joint venture. Having held the joint venture out as having expertise in corporate advising, and having undertaken through their agent AEFCAS to provide corporate advice to Aequitas, the joint venturers stood in a fiduciary relationship to Aequitas. The subject matter of the corporate advice included the purchase of Rendell Industries shares by Aequitas No 1 from AEFC Leasing. The joint venturers were under a

fiduciary duty to avoid a conflict between interest and duty. The fiduciary duty could be discharged by furnishing Aequitas with all the relevant knowledge which each of them possessed about that transaction, and revealing fully their financial interest, and obtaining the principal's fully informed consent.

310 Advice on the Rendell transaction included 'financial advice' of the kind that Brennan J had in mind, but the joint venture's retainer extended to corporate advice as well. However, there can be no material difference, in terms of fiduciary obligation, between an arrangement for the provision of financial advice and an arrangement for the provision of corporate advice, since in both cases the adviser undertakes to act in the interests of the client and not solely in the adviser's own interests, and the client is in a position of vulnerability: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, per Mason J.

To whom was the duty owed?

311 The application of the High Court's reasoning in *Daly v Sydney Stock Exchange* leads to the conclusion that the joint venturers owed the fiduciary duty of a corporate adviser to Aequitas. It seems to me that they stood in an equivalent fiduciary relationship with Aequitas No 1. Aequitas No 1 was an effectively wholly-owned subsidiary of Aequitas, to be used by Aequitas as an investment vehicle. There was no independent board. Aequitas No 1 was entitled to rely on, and have the benefit of, the corporate advice provided to its parent, especially as the advice extended to structuring the transaction, a question which must have included whether it was appropriate for the investment to be made by the parent or the subsidiary.

Who owed the duty?

312 I have expressed the view that the fiduciary duty of a corporate adviser was owed to Aequitas by the joint venturers, AEFC and CASO. AEFCAS offered in writing to provide the advice, acting as manager for the joint venture, and Messrs Mullins and Rees provided the advice in their capacity as a full-time executive and a consultant, respectively, of the joint venture. Since the joint venture was unincorporated, the contractual liability to provide advice fell upon the entities which constituted the joint venture, AEFC and CASO. Is it right to conclude that they also were responsible to Aequitas, as principals, to discharge the fiduciary duty of a corporate adviser?

313 When they discuss the criteria to be applied in judging whether a fiduciary relationship has arisen, courts frequently speak in terms of the vulnerability of the beneficiary, who has trusted another and has placed himself or herself in the hands of that person: for example, *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83. If these are indicia of a fiduciary relationship (cf *Hospital Products*, 156 CLR at 69 per Gibbs CJ; *Breen v Williams*, 186 CLR at 134; PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries & Trusts* (1989), p 46-7), there is room for doubting whether a principal comes under a fiduciary obligation when a third person reposes trust or confidence in his or her agent, if the third person is unaware of the principal's role and therefore cannot have personally trusted or relied upon the principal.

314 In the present case, however, the third person was Aequitas, the directors of which included Messrs Mullins and Rees, who were well aware of the roles of AEFC and CASO as joint venturers. In their capacity as directors of Aequitas, they placed the welfare of that company and its future investors in their own hands as executives of the joint venture, for the purpose of providing corporate advice. They did so on the basis that their corporate advice to Aequitas would be given on behalf of the joint venture, and therefore on behalf of the joint venturers as principals. Therefore, the interests of the company and its future investors were placed not only in the hands of Messrs Mullins and Rees, but also in the hands of AEFC and CASO. Aequitas was aware of all relevant facts, through Messrs Mullins and Rees.

315 The *Hospital Products* case makes it clear that a fiduciary duty may be of limited scope, depending on the nature and extent of the undertaking of one party to act in the interests of another. Consistently with that approach, one can conceive of a fiduciary relationship for provision of financial advice in which it is understood that, just as responsibility for preparing the advice is to be borne by an agent and

not the principal, the only conflicts of interest allowed to matter are those involving the agent, and the only requisite disclosure relates to information possessed by the agent. But there would need to be clear evidence that the limited nature of the fiduciary relationship was understood and accepted by the beneficiary before a court could conclude that a relationship, which would otherwise carry broader duties, would be subject to such limitations.

316 In the present case there is nothing to suggest that the joint venture's fiduciary obligations were limited so as to render irrelevant the knowledge, intentions and personal interests of the joint venturers. The letter of 23 August 1985 was written by AEFCAS without disclosure that it was the manager of a joint venture, and that the joint venture would provide the corporate advice which the letter offered. There was nothing in the letter which could be taken to limit the fiduciary obligations of the adviser so as to exclude the knowledge and interests of the venturers.

317 The plaintiffs contend that the fiduciary duty of a corporate adviser extended beyond the joint venture to Messrs Mullins and Rees personally. In my view, the legal principles applicable on the facts of this case do not allow the extension of the corporate adviser's financial duty to these two individuals. Messrs Mullins and Rees were engaged by CASO, who provided their services to the joint venture for the purposes of the joint venture business. They provided corporate advice to Aequitas, but they did so in the capacity of executive personnel of the joint venture, on secondment from CASO. Regardless of whether they were, together, the 'controlling mind and will' of the joint venture or AEFCAS, the corporate advisory work that they did was undertaken on behalf of the joint venture rather than by them personally. In performing that work, they owed contractual and fiduciary duties to the joint venture, but did not owe any personal duty to Aequitas. They also owed fiduciary duties to Aequitas in their capacity as directors of that company. The scope and content of those duties was necessarily different from the scope and content of the duties of a corporate adviser. I shall return to their duties as directors later.

318 The plaintiffs also contend that the fiduciary duty of a corporate adviser extended to Mr Gledhill personally. Mr Gledhill acted, at all relevant times, as general manager of AEFC. The plaintiffs submit that Mr Gledhill was the controlling mind of AEFC and AEFC Leasing, citing *Hamilton v Whitehead* (1988) 166 CLR 121, 127, 128. However, I have found, for the purposes of the equitable obligations generally, that Mr Gledhill was not the controlling mind of AEFC and AEFC Leasing. He was an employee of AEFC exercising delegated authority in his activities for the development of AEFC's equity investment business.

319 Mr Gledhill was closely involved in the planning for the establishment of Aequitas and also in the transactions for the purchase of shares in Rendell Industries by AEFC Leasing, and the subsequent sale of those shares by AEFC Leasing to Aequitas No 1. He knew that Messrs Mullins and Rees would cause Aequitas No 1 to enter into the purchase of the Rendell Industries shares because it was under their control at the time. But his involvement was at all times the involvement of the general manager of AEFC. It cannot be said that he gave any advice to either the Rendell group or Aequitas with respect to the Rendell transaction. The duty undertaken by the joint venturers to provide corporate advice to Aequitas was discharged on their behalf by Messrs Mullins and Rees. Mr Gledhill as not personally in a fiduciary relationship to provide corporate or investment advice to Aequitas.

320 There is a separate question, considered below, as to whether Mr Gledhill became liable for assisting the joint venturers to breach their fiduciary duty, under the so-called 'second limb' of *Barnes v Addy* (1874) LR 9 Ch App 244, at 251-2. I should note, for completeness, that there is no ground for finding that AEFC Leasing owed Aequitas the fiduciary duties of a corporate or financial adviser, though there is an issue as to whether it is liable as a promoter or under the second limb of *Barnes v Addy*.

The content of the fiduciary duty, and the breaches of duty

321 The joint venturers were obliged as fiduciaries to avoid placing themselves in a position in which their duty to provide corporate advice to Aequitas conflicted, or there was a real sensible possibility that it may conflict, with their personal interest, in the absence of full disclosure to and consent by Aequitas. From the time of Aequitas' conception, AEFC saw Aequitas as a convenient means of furthering the

business aspirations of AEFC. Once AEFC became responsible, as a principal, to provide corporate advice to Aequitas in respect of transactions referred to it by AEFC, there was a very real possibility of conflict between interest and duty. Further, both AEFC and CASO were in a position of conflict once they undertook to provide corporate advice to Aequitas, because their joint venture stood to gain fees from other parties in respect of transactions involving Aequitas. Further still, AEFC as a joint venturer was in a position of real conflict of interest throughout the transaction for the sale of shares in Rendell Industries to Aequitas No 1, because of the large discrepancy between the purchase price paid by AEFC Leasing and the proposed sale price to Aequitas.

322 These conflicts of interest could have been overcome by full disclosure of all relevant circumstances in the private placement memorandum, so that by applying for shares on the faith of that memorandum, investors in Aequitas could be taken to have assented to the benefits which were to flow to AEFC and CASO. However, the private placement memorandum fell far short of the kind of disclosure which would suffice for this purpose. Apart from the misleadingly optimistic assessment of the position of the Rendell group, the memorandum failed to disclose the true attitude of AEFC to Aequitas. There was a stark contrast between the vagueness of Mr Gledhill's open letter of 10 March 1986 and the specific and self-interested strategy of AEFC which was disclosed in Mr Gledhill's board paper dated 2 September 1985. Nor did the memorandum disclose the fees which AEFCAS and CASO were to derive from the Rendell Industries transaction. It did not disclose that the vendor of the Rendell Industries shares, AEFC Leasing, had acquired them, less than two months before selling them to Aequitas No 1, for a consideration of only $250,000, a much lower consideration than Aequitas No 1 had undertaken to provide.

Disclosure and informed consent

323 The principal personnel of the joint venture, for the purpose of discharging the contractual obligations of the joint venturers to provide corporate and financial advice to the clients of the joint venture, were Mr Mullins and Mr Rees. On 25 November 1985, when Aequitas No 1 contracted with AEFC Leasing to acquire its shares in Rendell Industries, Aequitas and Aequitas No 1 were owned and controlled by Mr Mullins and Mr Rees, their respective wives and Mr Elvy. There was no independent entity in whose favour Mr Mullins and Mr Rees, acting as executive personnel of the joint venture, should or could perform the joint venturers' fiduciary duty of disclosure to Aequitas.

324 Independent shareholders and directors were brought into the Aequitas group only in March 1986. At that stage the joint venture was providing corporate advice to the Rendell group, while concurrently providing corporate advice to Aequitas. To avoid their position of conflict, the joint venturers needed to disclose to the independent directors of Aequitas, as soon as they took office, and to prospective investors in Aequitas, everything that might reasonably be regarded as relevant to the making of the decision by Aequitas No 1 to acquire the Rendell Industries shares.

325 The disclosure obligation extended, at the very least, to the discrepancy between the amount paid by AEFC Leasing for the shares only seven weeks earlier, and the negotiated purchase price to be paid by Aequitas No 1, and also the nature and amounts of the benefits which the joint venturers would receive from the transaction. Insufficient information on such matters was included in the private placement memorandum for potential investors in Aequitas. I shall return to the inadequacy of the private placement memorandum later. There is no evidence that the requisite information was specifically provided or drawn to the attention of the independent directors, Messrs Rich, Pond and Donohoe. It is true, as I have found, that substantially all of the information available to the Rendell Industries board about the financial difficulties of the Rendell group was supplied to Mr Pond in about mid-March 1986, to permit him to prepare his report. The document supplied to Mr Pond included information about the purchase price for the Rendell Industries shares paid by AEFC Leasing. But it was not drawn to his attention and the documents were given to him for a different purpose. On the evidence I am unable to find that Mr Pond made all of the information in his hands available to Mr Rich or Mr Donohoe. I conclude, therefore, that the joint venturers failed to perform their fiduciary duty to Aequitas by their non-disclosure.

Breach of the fiduciary duties of directors of Aequitas and Aequitas No 1

326 Messrs Mullins and Rees were directors of both Aequitas and Aequitas No 1, on the one hand, and AEFCAS on the other hand. The plaintiffs contend that they breached their fiduciary duties to Aequitas and Aequitas No 1, having regard to *R v Byrnes* (1985) 183 CLR 501, in which Brennan, Deane, Toohey and Gaudron JJ said (at 516-7):

> 'A director of a company who is also a director of another company may owe conflicting fiduciary duties [citing *Ford v Andrews* (1916) 21 CLR 317 at 322]. Being a fiduciary, the director of the first company must not exercise his or her powers for the benefit or gain of the second company without clearly disclosing the second company's interest to the first company and obtaining the first company's consent. Nor, of course, can the director exercise those powers for the director's own benefit or gain without clearly disclosing his or her interest [citing *Liquidators of Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189 at 205-7] and obtaining the company's consent [citing *Chan v Zacharia* (1984) 154 CLR 178 198, 204; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103-4]. A fiduciary must not exercise an authority or power for the personal benefit or gain of the fiduciary or a third party [a term used by their Honours to mean a party whose interests are not coincident with the interests of the fiduciary's beneficiary] to whom a fiduciary duty is owed without the beneficiary's content.
>
> 'However, the articles of a company may permit - they frequently permit - a director who is interested in a proposed transaction to take the benefit of the transaction if he discloses his interest to the other members of the board and takes no part in the decision of the board on the transaction. In such a case, the quorum of the board required to deal with the transaction will ordinarily be interpreted as excluding directors whose interests preclude them from voting [citing *AM Spicer & Son Pty Ltd (In Liq) v Spicer* (1931) 47 CLR 151 at 186-7; *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 at 140]. If the director makes that disclosure and abstains from taking part in the decision, the validity of the transaction is not impaired. But a director who takes part in a decision to enter into a transaction in which the director or a third party in whom the director has an interest or to whom the director owes a fiduciary duty stands to gain an advantage or benefit but who does not make an adequate disclosure of his interest acts improperly.'

Breaches of duty by Mr Mullins and Mr Rees by their overall conduct

327 In my view, there was no failure to disclose the sheer facts of the dual directorships and the positions of Messrs Mullins and Rees with respect to the joint venture. These matters were adequately disclosed to potential investors in the private placement memorandum. AEFCAS was described in the document as 'Corporate Adviser', Mr Mullins was described as managing director of AEFCAS who founded CASO (which was described as having 'joint ventured' with AEFC to form AEFCAS), and Mr Rees was described as providing consultancy services to AEFCAS. In my opinion, these disclosures made it clear that Mr Mullins and Mr Rees, although directors of Aequitas, were engaged on behalf of the joint venture in the provision of corporate advice to Aequitas.

328 However, the private placement memorandum did not explain the full consequences of the dual positions of Messrs Mullins and Rees. As I have explained, Mr Gledhill planned to develop an equity investment business for AEFC. The corporate advisory business of the joint venture was a crucial component of his plans. His idea was that investment opportunities for AEFC would be identified by the joint venture, taken up by AEFC and then passed on to Aequitas, after AEFC had made a handsome investment profit and the joint venture had earned advisory fees. It is clear from the evidence as a whole that Messrs Mullins and Rees were well aware of the plans of Mr Gledhill and collaborated in them. The involvement with the Rendell group was seen by all concerned as the first project in AEFC's new business. Therefore, it was to be expected that AEFC would co-operate with the joint venture on future transactions, if the Rendell transaction could be brought to a satisfactory conclusion in which a profit would be crystallised for AEFC and fees would be earned for the joint venture. AEFC's co-operation in future transactions would be for the mutual benefit of the joint venturers and for the benefit of Messrs Mullins and Rees, whose future engagement in the joint venture's corporate advisory business would no doubt depend upon AEFC regarding it as worthwhile to participate in further transactions.